Perak Hydro Renewable Energy Corp Sdn Bhd & Anor v Wak Ngah Pili a/p Bah Adim (suing on behalf of herself and 22 individuals from the Senai tribe, as listed in 'Appendix A')

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-01(IM)(NCVC)-258–05 OF 2021
KAMALUDIN MD SAID, AZIZAH NAWAWI AND MARIANA YAHYA JJCA
17 OCTOBER 2022

Civil Procedure — Interlocutory injunction — Setting aside — Whether unexplained inordinate delay in applying for injunction disentitled applicant from obtaining the remedy — Whether the delay would seriously prejudice the other party who had expended huge sums of money to substantially complete work on project — Whether injunction should not have been granted as damages were an adequate remedy for applicant

The High Court had granted the respondents, who were Orang Asli residing in the Ulu Geruntum area in Gopeng, Perak, an interlocutory injunction barring the appellants and their servants and agents from entering into and/or trespassing upon their customary lands to construct a mini-hydroelectric power project. The respondents claimed that the construction works had destroyed their ancestral graves and crops and fruit trees they depended upon for subsistence and other needs, polluted the rivers they depended on for fishing and water supply and generally destroyed the natural environment and ecosystem. In the instant appeal against the granting of the injunction, the appellants said they were awarded a concession to construct, operate and maintain the mini-hydroelectric project to generate electricity for public consumption in the area. The appellants said preliminary works on the project began in 2011 and construction work started in 2016, yet it was only in October 2020 that the respondents applied for the interlocutory injunction, two years after filing a suit against the appellants and four others. The appellants claimed that the respondents' inordinate delay gravely prejudiced them because they had invested some RM12m in the project which was about 50% completed and that the injunction, if not removed, would cause them severe financial loss that even an award of damages could not compensate. In that regard, the appellants pointed out that the respondents when applying for the injunction did not give any undertaking to pay damages should they fail in their claim at the trial. The appellants also said the area where the project was being constructed was not gazetted as a native customary land area and there was no conclusive proof that the project area actually trespassed upon the respondents' customary lands.

Held, unanimously allowing the appeal and setting aside the interlocutory injunction:

(1) There was unexplained inordinate delay on the part of the respondents in applying for the interlocutory injunction and on that ground alone the High Court should have dismissed the injunction application (see paras 9 & 42).

(2) The High Court judge held that there was no delay in the filing of the injunction application because the complaints made by the respondents on the damage caused by the works on the project was a continuing one and that even if there was any delay, it did not cause injustice to allow the application. This court did not agree with that finding. The law was very clear that the application for the injunction must be made promptly (see paras 37–38).

(3) The respondents filed the action against the appellants and four others in April 2018 and only took out the injunction application in October 2020 even though they averred in their statement of claim that the appellants had trespassed on their customary lands in 2016. In fact, the defendants started preliminary works on the project in 2011 and the construction work commenced in 2016. There was clearly an inordinate delay in applying for the injunction which was not explained. The respondents should come to court with clean hands and delay, acquiescence or other inequitable conduct would defeat the grant of an injunction. The respondents' continuous complaints about the alleged damage caused by the construction works did not assist them unless they had taken prompt action to stop or prevent the damage or further damage from happening. The failure to file the injunction application promptly suggested that no serious damage was caused to the lands by the appellants and that the respondents could continue with their livelihood during the construction works (see paras 33–36 & 39).

(4) The appellants had expended considerable amount of time, effort and money in the sum of RM11,953,893.51 on the project and they stood to suffer massive financial/commercial loss and damage if the injunction was allowed to remain. Damages would not be an adequate remedy for the appellants. The High Court judge failed to consider whether the respondents were in a position to compensate the appellants if the respondents failed to succeed at the trial. The judge totally ignored the fact that the respondents never gave an undertaking to pay damages to the appellants when they applied for the injunction. Whilst poverty might be an exception to the requirement to give an undertaking as to damages, there was no proof of the respondents' poverty for the judge to exercise his discretion properly except to say that the respondents were Orang Asli and therefore generally had no financial capacity (see paras 48–49 & 52)

(5) Public interest had to be taken into account in assessing where the balance of convenience lay. The appellants averred that if there was no injunction, the project would be completed soon and the respondents and other residents living around the said area would benefit by it. It was important to appreciate that the mini-hydroelectric project did not involve the construction of any dam but channelled part of the river water into a pipe which would go downhill to run a turbine to generate electricity and thereafter the water would return to the river without altering the existing flow or water levels. Without the need for a dam or reservoir, people living at or near the river did not have to be relocated, the natural habitats were preserved and minimal damage was caused to the local ecosystem. The custom-made turbine, which could only be used for the instant project and for no other, was ready for installation; hence, allowing the injunction to remain would not only cause great injustice to the appellants but also be contrary to the public interest (see paras 53 & 56–59).

(6) In their amended statement of claim, the respondents had prayed for damages, as assessed by the court, for the alleged trespass committed by the appellants. This prayer indicated that damages were an adequate remedy for the respondents should they succeed at the trial. Therefore, the court would refuse the grant of the interlocutory injunction sought by the respondents (see paras 62–63 & 66).

[Bahasa Malaysia summary

Mahkamah Tinggi membenarkan perrmohonan responden-responden ('responden'), yang merupakan Orang Asli yang menetap di kawasan Ulu Geruntum di Gopeng, Perak, satu injunksi interlokutori menghalang perayu dan pekerja/ejen mereka daripada memasuki dan/atau menceroboh tanah adat mereka untuk membina projek kuasa hidroelektrik mini. Responden menghujahkan bahawa kerja-kerja pembinaan tersebut telah memusnahkan kubur nenek moyang dan tanaman serta pokok buah-buahan yang merupakan sara hidup dan keperluan lain, mencemarkan sungai yang mereka bergantung kepada bekalan ikan dan air dan secara amnya memusnahkan persekitaran semula jadi dan ekosistem. Dalam rayuan ini terhadap perintah injunksi tersebut, perayu menghujahkan bahawa mereka telah diberikan konsesi untuk membina, mengendali dan menyelenggara projek mini hidroelektrik untuk menjana elektrik bagi kegunaan awam di kawasan tersebut. Perayu berkata kerja-kerja awal projek tersebut bermula pada 2011 dan kerja pembinaan bermula pada 2016, namun hanya pada Oktober 2020 responden memohon injunksi interlokutori, dua tahun selepas memfailkan saman terhadap perayu dan empat yang lain. Perayu menghujahkan bahawa kelewatan responden amat menjejaskan mereka kerana mereka telah melabur kira-kira RM12 juta dalam projek tersebut yang mana telah siap sekitar 50 peratus dan injunksi tersebut, sekiranya tidak dibatalkan, akan menyebabkan mereka mengalami

kerugian kewangan yang teruk dan ganti rugi pun tidak dapat memampas kerugian. Sehubungan itu, perayu menegaskan bahawa responden ketika memohon injunksi tidak memberikan sebarang aku janji untuk membayar ganti rugi sekiranya mereka gagal dalam tuntutan mereka di dalam perbicaraan. Perayu juga berkata kawasan di mana projek tersebut dibina tidak diwartakan sebagai kawasan tanah adat orang asli dan tiada keterangan kukuh bahawa kawasan projek tersebut sebenarnya menceroboh tanah adat responden.

Diputuskan, sebulat suara membenarkan rayuan dan mengenepikan injunksi interlokutori:

(1) Terdapat kelewatan yang tidak dapat dijelaskan di pihak responden dalam memohon injunksi interlokutori dan atas alasan tersebut sahaja Mahkamah Tinggi sepatutnya menolak permohonan injunksi tersebut (lihat perenggan 9 & 42).

(2) Hakim Mahkamah Tinggi memutuskan bahawa tiada kelewatan dalam pemfailan permohonan injunksi kerana aduan yang dibuat oleh responden mengenai kerosakan yang disebabkan oleh kerja-kerja projek tersebut adalah berterusan dan walaupun terdapat kelewatan, ianya tidak menyebabkan ketidakadilan untuk membenarkan permohonan tersebut. Mahkamah ini tidak bersetuju dengan alasan tersebut. Undang-undang adalah sangat jelas bahawa permohonan injunksi mestilah dibuat dengan segera (lihat perenggan 37–38).

(3) Responden memfailkan tindakan tersebut terhadap perayu dan empat yang lain pada April 2018 dan hanya menarik balik permohonan injunksi pada Oktober 2020 walaupun mereka memplidkan dalam pernyataan tuntutan mereka bahawa perayu telah menceroboh tanah adat mereka pada 2016. Malah, defendan memulakan kerja-kerja awal projek tersebut pada 2011 dan kerja pembinaan bermula pada 2016. Adalah jelas terdapat kelewatan dalam memohon injunksi yang tidak dijelaskan. Responden harus datang ke mahkamah dengan tangan yang bersih dan kelewatan, penerimaan atau perbuatan tidak berekuiti akan menyebabkan injunksi tidak boleh diberikan. Aduan berterusan responden mengenai kerosakan yang didakwa disebabkan oleh kerja-kerja pembinaan tidak membantu mereka melainkan mereka telah mengambil tindakan segera untuk menghentikan atau menghalang kerosakan selanjutnya daripada berlaku. Kegagalan memfailkan permohonan injunksi tersebut dengan segera menunjukkan bahawa tiada kerosakan serius terhadap tanah tersebut oleh perayu dan responden boleh meneruskan kehidupan mereka semasa kerja-kerja pembinaan (lihat perenggan 33–36 & 39).

(4) Perayu telah menghabiskan banyak masa, kerja dan wang dalam jumlah RM11,953,893.51 untuk projek tersebut dan mereka akan mengalami

kerugian dan kerosakan kewangan/komersial yang besar sekiranya injunksi dikekalkan. Ganti rugi tidak akan menjadi remedi yang mencukupi untuk perayu. Hakim Mahkamah Tinggi gagal mempertimbangkan sama ada responden berada dalam kedudukan untuk membayar ganti rugi kepada perayu sekiranya responden gagal berjaya pada perbicaraan. Hakim sama sekali tidak mengambilkira fakta bahawa responden tidak pernah memberi aku janji untuk membayar ganti rugi kepada perayu apabila mereka memohon injunksi tersebut. Walaupun kemiskinan mungkin pengecualian kepada keperluan untuk memberi aku janji mengenai ganti rugi, tiada bukti mengenai kemiskinan responden untuk hakim menggunakan budi bicaranya dengan betul kecuali untuk mengatakan bahawa responden adalah Orang Asli dan oleh itu secara amnya tidak mempunyai keupayaan kewangan (lihat perenggan 48–49 & 52).

(5) Kepentingan awam perlu diambil kira dan dinilai secara seimbang. Perayu berhujah bahawa sekiranya tiada injunksi tersebut, projek tersebut akan disiapkan tidak lama lagi dan responden serta penduduk lain yang tinggal di sekitar kawasan tersebut akan mendapat manfaat daripadanya. Perayu menghujahkan bahawa,projek mini hidroelektrik tersebut tidak melibatkan pembinaan mana-mana empangan tetapi menyalurkan sebahagian air sungai ke dalam paip yang akan menuruni bukit untuk menjalankan turbin bagi menjana tenaga elektrik dan selepas itu air tersebut akan mengalir ke sungai tanpa mengubah aliran atau paras air sedia ada. Tanpa memerlukan empangan atau takungan, orang yang tinggal di atau berhampiran sungai tidak perlu dipindahkan, habitat semula jadi dipelihara dan kerosakan minimum disebabkan oleh ekosistem tempatan. Turbin buatan khas, yang hanya boleh digunakan untuk projek itu telah siap untuk pemasangan; Oleh itu, membenarkan mengekalkan injunksi tersebut bukan sahaja akan menyebabkan ketidakadilan yang besar kepada perayu tetapi juga bertentangan dengan kepentingan awam (lihat perenggan 53 & 56–59).

(6) Dalam pernyataan tuntutan terpinda, responden telah memohon ganti rugi, seperti yang dinilai oleh mahkamah, atas dakwaan pencerobohan yang dilakukan oleh perayu. Tuntutan ini menunjukkan bahawa ganti rugi adalah remedy yang mencukupi untuk responden sekiranya mereka berjaya dalam perbicaraan. Oleh itu, mahkamah menolak injunksi interlokutori yang dipohon oleh responden (lihat perenggan 62–63 & 66).]

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241, SC (refd)

American Cyanamid Co v Ethicon Ltd [1975] AC 396, HL (refd)

Associated Tractors Sdn Bhd v Chan Boon Heng & Anor [1990] 2 MLJ 408, SC (refd)
Evercrisp Snack Products (M) Sdn Bhd & Anor v Sweeties Food Industries Sdn Bhd [1980] 2 MLJ 297 (refd)
Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)
Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor [1986] 2 MLJ 198, SC (refd)
Hubbard and others v Pitt and others [1975] 3 WLR 201, CA (refd)
Kasim a/l Musa & Ors v Maniam a/l Raman [2001] 6 MLJ 696, HC (refd)
Kawood Sdn Bhdv HSBC Bank Malaysia Berhad & Ors [2001] MLJU 650, HC (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)
Kilang Kosfarm Sdn Bhd v Kosma Nusantara Bhd [2002] 5 MLJ 662, HC (refd)
Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors [1992] 2 MLJ 10, HC (refd)
Maybank Investment Bank Berhad & Ors v Million Westlink Sdn Bhd & Anor [2015] MLJU 2252, HC (refd)
Mogul Steamship Co v McGregor, Gow & Co and others [1892] AC 25, HL (refd)
Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd [2000] 2 MLJ 133, CA (refd)

Legislation referred to

Government Proceedings Act 1956 s 29

Appeal from: *Wak Ngah Pili a/p Bah Adim (menyaman untuk diri sendiri dan untuk 22 individu Suku Kaum Senai) lwn Perak Hydro Renewable Energy Corporation Sdn Bhd dan lain-lain* [2021] MLJU 1789 (High Court, Ipoh)

Goik Kenzin (with Ramesh Sivakumar and Narendran Letchiemanan) (Goik, Ramesh & Loo) for the appellant.
Vinu Kamalananthan (with Conrad Lopez and Sarah Tiong) (Vinu & Lopez) for the respondent.

Kamaludin Md Said JCA:

INTRODUCTION

[1] This is the appeal against the order granted by the learned judicial commissioner of the Ipoh High Court on 28 April 2021 where the respondents'/plaintiffs' application (encl 92) for interlocutory injunctions dated 9 October 2020 against the appellants/first and second defendants (the defendants) was allowed.

[2] For the purpose of this appeal, the parties will be referred to as they were in the High Court.

[3] The plaintiffs' cause of action against the defendants is solely in respect of trespass. The plaintiffs alleged that the land used for the construction of the mini-hydroelectric project was the customary lands of the plaintiffs, thereby claiming trespass against the defendants for entering the land.

[4] The application for an interlocutory injunctive order, is essentially as follows:

(a) an interlocutory injunction that the first and second defendant (the defendants), their servants and/or agents be barred from entering and/or trespassing the customary lands that are claimed by the plaintiffs in this action; and

(b) an order that the first and second defendant (the defendants), their servants and/or agents be prevented and/or stopped from continuing and/or commencing any works on the customary lands that are claimed by the plaintiffs in this action.

[5] The defendants objected to the said application and contended that the lands used for the purpose of constructing the said project was lawfully approved by the State authorities to the defendants. The project was for public purpose, aiming at generating electricity to the public at large in that area. The selection of the river in Sungai Ulu Geruntum for the development of the project is based on the feasibility study made by the consultant to ensure that the project is viable and generate enough electricity for the public.

[6] The defendants have been awarded with a concession for 25 years by Sustainable Energy Development Authority Malaysia (SEDA) to undertake, operate and maintain the mini-hydroelectric project in that area. The approval from the State and local authorities to use the lands had been obtained earlier before the commencement of this action in 2018 by the plaintiffs.

[7] The defendants have started the preliminary works since 2011 and the construction work had commenced in 2016. Having notice of these events, no prompt action whatsoever has been initiated by the plaintiffs to prevent the project from being continued. Only in October 2020 did the plaintiffs made an application for an interlocutory injunction in court, that is four years after the commencement of the construction work in that area. The inordinate delay and omission on the part of the plaintiffs would cause great injustice and jeopardise the defendants' hydroelectric project.

[8] The learned judicial commissioner had granted the interlocutory

injunction to the plaintiffs and in this appeal the defendants contended that the learned judicial commissioner has misdirected himself in law and in facts in his decision to grant the injunctive relief to the plaintiffs.

[9] We have considered the grounds raised by the defendants and having heard the oral submissions and read the written submissions, we find the plaintiffs' application for interlocutory was not made promptly. There is inordinate delay on the part of the plaintiffs in filing the application for interlocutory injunction and the delay was not explained. In other words, there was no urgency and the plaintiffs had slept on their rights. Added to that, we find that damages is an adequate remedy for the plaintiffs in the event that they succeed in the full trial of the action against the defendants.

[10] We find that there is merit in the appeal. It is our unanimous decision that the appeal is allowed with no order as to costs. The order of the learned judicial commissioner to grant the interlocutory injunction to the plaintiffs is set aside without any order as to costs.

BRIEF FACTS OF THE CASE

[11] The plaintiffs are from the Senoi subgroup of the Semai Orang Asli ('Semai') and claimed that they reside in an area known as Ulu Geruntum, Gopeng, Perak ('Ulu Geruntum'). The Semai claim native customary rights over the lands in Ulu Geruntum, which would include the seven villages along the Ulu Geruntum River, namely Kampung Sungai Kapor, Kampong Sat, Kampung Kepayang, Kampung Empang Main, Kampung Poh, Kampung Ulu Geruntum, and Kampung Padang Beliku.

[12] The plaintiffs claim that the Semai have historically inhabited the villages and surrounding areas in Ulu Geruntum which encompasses around 2,942.5 hectares. The Semai consider the land areas to be their native customary lands. These customary lands are the subject matter of the High Court suit.

[13] Sometime in 2011, the Semai were notified of the proposal to build the mini hydroelectric dams by the first defendant in Ulu Geruntum along the Geruntum River. However, the Semai objected to the building of the hydroelectric dams in Ulu Geruntum.

[14] Sometime in March 2012, the plaintiffs claimed that the defendants had wrongly encroached and commenced works of the hydroelectric dams in Ulu Geruntum, which entailed land clearing for the relevant structures of the hydroelectric dams.

[15] The plaintiffs claim that this land clearing by the defendants in Ulu Geruntum had caused destruction to the ancestral graves of the Semai on the Customary Lands. There was also destruction of various crops and fruit trees of the Semai which adversely impacted sources of income, food, and medicine of the Semai. The plaintiffs also contended that the construction of the hydroelectric dams had caused flash floods as well as pollution to the Ulu Geruntum River, which is a main source of water supply for the Semai.

[16] Since the defendants had commenced works on the mini hydroelectric dams, the plaintiffs made numerous police reports and reached out to the Federal and State Governments, government bodies, and non-governmental bodies to assist them with their plight to oppose the building of the hydroelectric dams, but it was to no avail.

[17] Seeing no respite in their favor, the plaintiffs commenced the High Court suit on 25 April 2018.

[18] The plaintiffs' rights over the customary lands are the primary subject matter of the High Court suit, whereby the plaintiffs seek amongst others, a declaration that the said customary lands belong to the plaintiffs by virtue of their Orang Asli native customary rights.

[19] The plaintiffs claim that the Semai maintain a traditional relationship with the customary lands as the lands, forest, caves, and rivers of the customary lands are important to the continued existence of their community.

[20] From September to October 2020, the defendants continued their encroachment and works on the customary lands. Given the severity of the continuous destruction and danger caused by the wrongful encroachment and works of the defendants, the plaintiffs claimed that they had no choice but to proceed with the plaintiffs' application which raised the following key issues in support of the granting of an injunction pending the disposal of the High Court suit:

(a) the works by the defendants on the hydroelectric dams are causing danger to the Semai people living in the surrounding areas;

(b) the works by the defendants on the hydroelectric dams are causing untold and irreversible damage to the customary lands; and

(c) the works by the defendants are causing pollution to the lands and rivers of the customary lands.

[21] Having heard the plaintiffs' application, the judicial commissioner allowed the application and granted an interlocutory injunction against the

defendants on 28 April 2021 on the following terms:

(1) Suatu perintah Injunksi Interlokutori untuk menyekat dan/atau menghalang Defendan Pertama dan/atau Defendan Kedua dan/atau pengkhidmat-pengkhidmat dan/atau agen-agen mereka daripada memasuki dan/atau menceroboh kawasan tanah-tanah adat yang dituntut oleh Plaintif-Plaintif dalam tindakan ini yang dilampirkan sebagai 'Lampiran 1' dalam Notis Permohonan ini dan khususnya kawasan dan sempadan yang ditandai sebagai A, sementara menunggu penentuan muktamad tindakan ini oleh Mahkamah Yang Mulia ini di mana Wakil/pekerja Defendan Pertama dan Defendan Kedua hanya dibenarkan masuk ke kawasan pembinaan bagi tujuan keselamatan, penjagaan dan penyelenggaraan harta Defendan Pertama dan/atau Defendan Kedua yang kini berada di tapak pembinaan;

(2) Suatu perintah bahawa Defendan Pertama dan/atau Kedua dan/atau pengkhidmat-pengkhidmat dan/atau agen-agen mereka disekat dan dihalang daripada meneruskan apa-apa kerja (termasuk tetapi tidak terhad kepada kerja pembinaan dan/atau penambakan tanah) dalam kawasan tanah-tanah adat yang dituntut oleh Plaintif-Plaintif dalam tindakan ini yang dilampirkan sebagai 'Lampiran 1' dalam Notis Permohonan ini dan khususnya kawasan dan sempadan yang ditandai sebagai A, sementara menunggu penentuan muktamad tindakan ini oleh Mahkamah Yang Mulia ini;

(3) Suatu perintah bahawa Defendan Pertama dan/atau Kedua dan/atau pengkhidmat-pengkhidmat dan/atau agen-agen mereka disekat dan dihalang untuk memulakan apa-apa kerja (termasuk tetapi tidak terhad kepada kerja pembinaan dan/atau penambakan tanah) dalam kawasan tanah-tanah adat yang dituntut oleh Plaintif-Plaintif dalam tindakan ini yang dilampirkan sebagai 'Lampiran 1' dalam Notis Permohonan ini dan khususnya kawasan dan sempadan yang ditanda sebagai A, sementara menunggu penentuan muktamad tindakan ini oleh Mahkamah Yang Mulia ini; dan

(4) Kos dalam kausa.

THE DEFENDANTS' GROUNDS OF APPEAL

[22] The defendants' several grounds of appeal can be summarised as follows:

(a) that the project was for the public purpose, aiming at generating electricity to the public at large in that area. The defendants have been awarded with the concession to undertake, operate and maintain the mini-hydroelectric project in that area. The selection of the river in Sungai Ulu Geruntum for the development of the project is based on the feasibility study made by the consultant to ensure the project is viable and generate enough electricity for the public;

(b) the approval from the State and local authorities to use the land had been obtained earlier before the commencement of this action in 2018 by the

plaintiffs. The defendants have started the preliminary works since 2011 and the construction work had commenced in 2016;

(c) there is no damage or pollution of the environment caused by the defendants to the said land for the court to rationally arrive at a conclusion that the defendants had caused serious damage and pollution to the environment on the said land;

(d) the defendants had invested large capital in the project and the order of interlocutory injunction granted by the court had caused the project to be stopped resulting in the defendants facing a serious financial risk;

(e) the plaintiffs failed to give an undertaking of damages in the application for interlocutory injunction;

(f) the plaintiffs filed the interlocutory injunction in court in October 2020 that is four years after the commencement of the construction work in that area. The inordinate delay and omission on the part of the plaintiffs would cause great injustice and jeopardise the defendants;

(g) the lands belongs to the State Government of Perak, the third defendant and no evidence in the form of undertaking, promise or approval that the land is to be *gazetted* as customary lands under the Act;

(h) the plaintiffs failed to disclose or show proof on prima facie that the plaintiffs have the right over the land as customary lands and reside on the said lands;

(i) the plaintiffs failed to identify the accuracy of land areas claimed as customary lands; and

(j) the lands where the project was carried out by the defendants is not on or within the land claimed by the plaintiffs as customary lands.

THE LAW ON INJUNCTION

[23] The Court of Appeal in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, summarised the correct approach to be adopted in hearing an application for an interlocutory injunction. Gopal Sri Ram CJA said:

> To summarise, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
>
> (a) he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these

A are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand, if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

B (b) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that C would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial D position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng* E *Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and (3) the F judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang* G *Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event H that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgement the several factors that weighed in his mind when arriving at his conclusion.

I **[24]** In summary, the court must apply the following principles:

(a) whether there is a bona fide serious question to be tried;

(b) if there is a serious issue to be tried, the court must go on to decide where the justice of the case lies; and

(c) the judge must have in the forefront of his mind that the remedy he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper.

[25] The House of Lords stated in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, that where an application for interlocutory injunction is before the court, the court must:

(a) satisfy itself on the evidence before it on the application that the plaintiff has (per Lord Diplock) 'a real prospect' of succeeding in his claim for a full injunction at the trial. If it does not, the injunction may not be granted;

(b) if it does so satisfy itself, the court should then go on to consider:

(i) whether if the plaintiff is successful at the trial, he could be adequately compensated in damages for the loss he would have suffered by the defendant being allowed to continue to act unlawfully. If damages would be an adequate remedy; and if the defendant could afford to pay them, the injunction should not be granted; and

(ii) whether if the defendant is successful at the trial, and the interlocutory injunction had been granted, he could be adequately compensated in damages for being restrained from doing something which he was lawfully entitled to do, up till the date of the trial. If damages would, in this way, be an adequate remedy, and the plaintiff could afford to pay them, an injunction should be granted.

(c) where there is doubt as to adequacy of damages as a remedy to either of both parties, then the court should look at all the circumstances of the case and decide whether the balance of convenience is in favor of granting an injunction; and

(d) where the arguments based upon the balance of convenience appear to be evenly balanced, the court should preserve the status quo ie if the injunction is to prevent the defendant from doing something he is already doing, it should be refused, whereas if it is to stop him starting a new activity it should be allowed.

[26] In considering whether balance of the justice would require an injunction to be granted, the court would consider amongst others:

(a) whether damages would be an adequate remedy;

(b) whether the party applying for injunction would suffer a greater deal, if injunction is not granted; or

(c) whether the party resisting the injunction would suffer more if the injunction is granted.

ANALYSIS/DECISION

[27] The Semai claim that they have historically inhabited the villages and surrounding area in Ulu Geruntum which encompasses around 2,942.5 hectares. The Semai consider the areas as their native customary lands. The claim against the third, fourth, fifth and sixth defendants is for a declaration that the said customary lands belong to the plaintiffs by virtue of their Orang Asli native customary rights. These customary lands are the subject matter of the High Court suit. The claim against the first and second defendants is for trespass and for commencing work to build hydroelectric dams in the alleged customary lands.

Government related project

[28] The defendants submitted that the mini hydroelectric project is a government related project. The first defendant is the state agency having its function as the developer of the mini-hydroelectric project in the State of Perak. Based on the authority, no injunction could be directly or indirectly issued against the Government or its officers. Similarly, the court has no jurisdiction to grant an injunction against a private litigant if the injunction would have the effect of restraining the Government or its officers from performing their functions (see: *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12).

[29] In our view although the first defendant is the state agency, it does qualify as a government body. The first defendant is a registered company and their employees are not government officers or employees. The application for interlocutory injunction is correctly addressed to the first and second defendant, the private companies and it is not made against the third, fourth, fifth and sixth defendant in this case which are the government bodies. In our view s 29 of the Government Proceedings Act 1956 does not apply in the context of both the first and second defendant respectively.

Inordinate delay

[30] The defendants submitted that the application for interlocutory injunction was not made promptly. There was an inordinate delay on the plaintiffs' part in filing the application for an interlocutory injunction. On this ground alone, the High Court should dismiss the application for an injunctive relief.

[31] It is a well-settled principle of law that delay is a relevant factor in proceedings for an injunction following the equitable maxim that equity aids the vigilant, and not those who sleep on their rights. Thus, applications for interlocutory injunctions must be made promptly (see *Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors* [1992] 2 MLJ 10). The judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application (see *Keet Gerald Francis Noel John v Mohd Noo r@ Harun bin Abdullah & Ors*).

[32] In *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241, the court held that the plaintiff having sufficient notice of the defendant's intention to commit the act sought to be restrained is guilty of unreasonable delay in applying to the court. Further, in considering the lapse of time, delay commences to run from the discovery of circumstances giving the title to relief. The court held as follows:

> As with all equitable reliefs, delay is a relevant factor in interlocutory proceedings for injunctive relief. An important maxim in regard to delay is that equity aids the vigilant, and not those who sleep on their rights; 'vigilantibus, non dormientibus, jura subeniunt'. The essence of an application for interlocutory injunction is that it should be made with promptitude. It is said that the court will not grant an interlocutory injunction if the plaintiff having sufficient notice of the defendant's intention to commit the act sought to be restrained is guilty of unreasonable delay in applying to the court. The illustration of this principle is to be found in the case of *Salisbury v Metropolitan Railway Co* (1870) 22 LT 839. The cases of *Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198 and *Chung Khiaw Bank Ltd* [1968] 1 MLJ 299 cited above are Malaysian authorities on the same point. It must be pointed out, however, that not all delay is bad delay or, to be precise, inexcusable, as it may be explained or inevitable.
>
> Salmon LJ in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229; [1968] 1 All ER 543; [1968] 2 WLR 366 set out three factors which are relevant in considering whether delay should be allowed as a ground to refuse an interlocutory injunction. These factors are at [1968] 2 QB 229 at p 268; [1968] 1 All ER 543 at p 561; [1968] 2 WLR 366 at p 390. Salmon LJ said:
>
> > ... In order for such an application to succeed, the defendant must show:
> >
> > (1) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff — so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. These vary infinitely from case to case, but inordinate delay should not be too difficult to recognise when it occurs.
> >
> > (2) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
> >
> > (3) that the defendants are likely to be seriously prejudiced by the delay. This

A may be prejudice at the trial of the issue between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

B It must also be emphasised here what is important to consider is not so much the length of the delay but whether the delay has in some ways made it unjust to grant the injunction claimed. Megarry J's observation in the case of *Legg v Inner London Education Authority* [1972] 3 All ER 177 at p 191; [1972] 1 WLR 1245 at pp 1259–1260 is apposite:

C

> I have hesitated somewhat on this point. What seems to be important is not so much the length of the delay per se, but whether the delay has in some ways made it unjust to grant the injunctions claimed. An injunction granted now would be more burdensome to the ILEA and to the parents and boys affected by it than an injunction granted two months ago. Nevertheless, I am not
>
> D persuaded that the added burden is of sufficient weight to bar the remedy ...

[33] In the present case, the plaintiffs commenced this action in 2018. The plaintiffs in their statement of claim also claim that in 2016, the defendants
E were trespassing on the said land. However, the plaintiffs only filed the writ and statement of claim on 25 April 2018 and took out an application for injunction in October 2020.

[34] The defendants have started the preliminary works since 2011 and the
F construction work commenced in 2016. In fact, the plaintiffs admitted that sometime in March 2012, the defendants had wrongly encroached and commenced works of the hydroelectric dams in Ulu Geruntum, which entailed land clearing for the relevant structures of the mini hydroelectric dams. The plaintiffs were also aware that the defendants had thereafter started the land
G clearing work and built structures needed for the purposes of building the mini-hydroelectric project.

[35] Having notice of these events, no prompt action whatsoever has been initiated by the plaintiffs to prevent the project from being continued. There
H was a four years delay from the time the defendants commenced the works.

[36] Since filing the action in 2018, the plaintiffs failed to file the application for interlocutory injunction promptly but waited for the case to be fixed for full trial which was subsequently fixed on 3 March 2020. On 4 October 2020 the
I plaintiffs' solicitor wrote to the defendants' solicitor to cease their encroachment and works. The plaintiffs filed the application on 9 October 2020. In the circumstances we agree with the defendants that there is delay in filing the application for interlocutory injunction. The plaintiffs should come to court with clean hands and delay, acquiescence or other inequitable conduct

may go against the grant of an injunction.

[37] The learned judicial commissioner in his grounds of judgment held that there is no delay in filing the application based on his finding that the complaint made by the plaintiffs on the damage caused on the land areas in Ulu Geruntum is something which is continuing. He found the last incident was on 3 October 2020 and the application was filed on 9 October 2020. Further, if there is any delay, it does not cause injustice to allow the application. The main issue is with regard to plaintiffs customary lands and the preservation of the lands. The loss suffered by the defendants are financial loss.

[38] We do not agree with the reasons that the plaintiffs' complaint is continuing therefore the filing of the application on 9 October 2020 is not a delay. In our view, the law is very clear that the application for interlocutory injunction must be made promptly. The plaintiffs must file the application sooner or within a reasonable time to prevent damage or further damage to the land areas as claimed by them.

[39] The defendants had already commenced construction works in 2016. The plaintiffs' continuous complaints about the alleged damage to the lands caused by the construction works of the defendants does not assist them unless prompt action was taken to stop or prevent the damage or further damage from happening. Why did the plaintiffs waited until the alleged last incident on 3 October 2020 and only acted by filing the application on 9 October 2020. The filing of the application after the full trial was fixed on 3 March 2020 and later, on 9 October 2020 which is four years later militates against the grant of injunction. The failure to file the application promptly suggests that no serious damage had been caused to the said lands' areas by the defendants. The delay in taking action also suggests that the plaintiffs could continue with their livelihood at the said land areas during the construction works. There is no explanation given by the plaintiffs why the application was only made on 9 October 2020 and not before.

[40] The defendants have stated that they have put in their workers and contractors to complete a substantial portion of the entire works which the defendants estimates at 50% of the work progress. The plaintiffs' application for injunctive relief, if granted, effectively require the defendants to cease and abandon all their works, withdraw their workers and contractor from the site which if they were ordered to do so, would lead to disastrous consequences at site and to the defendants. The learned judicial commissioner took issue on this and made a finding that the defendants' work progress was only for 28.8% and the delay in work progress is only 24.6%. Accordingly, he said that the issue of whether there is delay in filing the application for interlocutory injunction depends on the circumstances of the case.

[41] The defendants cited some cases where the courts had dismissed the application for interlocutory injunction on the grounds of delay as the following:

(a) *Kasim a/l Musa & Ors v Maniam a/l Raman* [2001] 6 MLJ 696, the court agreed with the principle laid down by the Supreme Court in *Alor Janggus.* The court dismissed the plaintiffs' application for the interlocutory injunction as His Lordship was of the view that there has been inordinate delay (eight months) on the part of the plaintiffs in applying for the interlocutory injunction. His Lordship also found that the inordinate delay was inexcusable;

(b) *Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198, the Supreme Court found that there was a serious question to be tried. However, the court refused to grant the interlocutory injunction to the appellant because of the long delay of two months before the appellant sought relief and this delay was held to be unreasonable and unexplained by the appellant. The court said, proving a question to be tried alone is not sufficient for the appellant to obtain the interlocutory injunction as this discretionary remedy shall not be made available to those who sleep on their rights;

(c) *Maybank Investment Bank Berhad & Ors v Million Westlink Sdn Bhd & Anor* [2015] MLJU 2252 which followed *Hj Wan Habib Syed Mahmud* and *Alor Janggus,* had said that unexplained and unreasonable delay in filing an interlocutory injunction application was sufficient reason in itself for the court's refusal to exercise discretion to grant an interlocutory injunction; and

(d) *Evercrisp Snack Products (M) Sdn Bhd & Anor v Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297, the High Court agreed with the counsel for the defendants that there was undue delay on the part of the plaintiffs in applying for an interlocutory injunction. In this case, there was a delay of about 22 months which had not been explained in the affidavit of the plaintiffs. The plaintiffs' application for interlocutory injunction pending the trial of the motion was dismissed. However, the court directed the case to be put on the priority list for an early hearing date.

[42] Based on the inordinate delay on the part of the plaintiffs in filing the application for interlocutory injunction, we are of the considered view that on this ground alone the interlocutory injunction application should have been dismissed by the High Court.

There are serious issues to be tried

[43] The plaintiffs had put forth, amongst others, the following serious questions to be tried in the High Court:

(a) whether the areas and boundaries that are marked as 'A' in the notice of application for respondent's application earmark the Customary Lands of the respondents?

(b) whether the permission by the Perak State Government to the appellants to enter the Customary Lands is valid under the law?

(c) whether the works done by the appellants on the Customary Lands are illegal?

(d) whether the appellants had committed trespass on the Customary Lands? and

(e) whether the appellants are entitled to a mandatory injunction to prevent the appellants from continuing to trespass and destroy the Customary Lands?

[44] Having acquainted with the facts of the case, the learned judicial commissioner was of the opinion that there is a serious issue to be tried. He found that the issue of whether the land areas in Ulu Geruntum is customary lands is in fact a serious issue to be tried.

[45] The learned judicial commissioner held that there is serious issue to be tried with regard to land area in Ulu Geruntum. It must bear in mind that pleadings and evidence are incomplete at that stage and the learned judicial commissioner is not making any determination on the merits of the claim or any defense to it. It is sufficient for him to identify the issues raised on whether these are serious enough to merit a trial. The learned judicial commissioner has considered the relevant material before him including the submissions of counsels and found there are serious issues to be tried. We are of the same view with the learned judicial commissioner on this point. This is a low threshold to be met and it only required the plaintiffs to demonstrate that their claim was neither frivolous nor vexatious.

Balance of convenience

[46] The learned judicial commissioner decided that the balance of convenience is in the plaintiff's favour based on reasons which appears in the judgment as follows:

> [32] Mahkamah mendapati keadilan dalam kes ini berpihak kepada plaintif-plaintif. Mahkamah berpendapat bahawa plaintif-plaintif akan mengalami kemudaratan dan ketidakadilan yang lebih sekiranya relief yang dituntut dinafikan. Kemusnahan tanah adat plaintif-plaintif merupakan suatu kerosakan yang tidak dapat dipulihkan dan ganti rugi bukanlah remedi yang memadai.
>
> [33]. Hasrat plaintif-plaintif dalam kes ini adalah untuk mengekalkan keadaan tanah adat di Kawasan Ulu Geruntum dalam keadaan yang sedia ada dan dalam

keadaan asal. Tanah adat tersebut merupakan sistem sokongan kehidupan plaintif-plaintif dan amat penting untuk memastikan kewujudan berterusan komuniti mereka. Mereka bergantung kepada tanah adat sebagai tempat tinggal dan kediaman mereka. Kaum Semai biasanya memburu haiwan di kawasan hutan Ulu Geruntum. Mereka juga bergantung kepada sungai untuk menangkap ikan dan sebagai sumber air. Di dalam hutan, plaintif-plaintif menjalankan aktiviti mengutip pelbagai jenis buah-buahan dan hasil-hasil hutan termasuk herba-herba, akar-akar kayu semula jadi serta berbagai-bagai tumbuh-tumbuhan. Hasil-hasil ini menjadi sumber makanan, ubat-ubatan dan juga pendapatan bagi plaintif-plaintif. Terdapat juga tanah-tanah yang menjadi tempat keramat bagi mereka dan amat penting bagi tujuan spiritual dan perkembangan kebudayaan mereka.

...

Bagi plaintif-plaintif tanah adat tersebut adalah bagi tempat tinggal, mata pencarian, makanan, ubat-ubatan, spiritual dan budaya mereka. Tanah adat itu adalah segala-galanya bagi plaintif-plaintif.

[34] Jika kerja-kerja pembinaan diteruskan ia akan menyebabkan kemusnahan kepada perkara pokok dalam tuntutan ini iaitu tanah adat plaintif-plaintif, sebelum tuntutan ini dapat diberi apa-apa pengadilan. Sekiranya perkara ini terjadi, kerosakan terhadap tanah adat plaintif-plaintif tidak akan dapat dipulihkan dan ganti rugi tidak akan merupakan remedi yang memadai. Manakala jika injunksi interlokutori dibenarkan ia hanya akan menyebabkan kerugian kewangan kepada defendan pertama dan kedua.

[47] The defendants submitted that the learned judicial commissioner is very concerned and sympathetic to plaintiffs that the continuing construction of the mini hydro would endanger the plaintiffs' life and cause irreparable damage to the plaintiffs' 'tanah adat' and their livelihood. It was submitted that the learned judicial commissioner's fear and concern are misplaced.

[48] We are of the view that if the injunction is granted it would cause the defendants to suffer massive financial and/or commercial loss and damage which they have expended considerable amount of time, effort and money in the sum of RM11,953,893.51. The defendants would suffer irreparable damage and damages would not be an adequate remedy to the defendants.

[49] The balance must be struck. The learned judicial commissioner failed to give proper weight to the defendants financial position to pay damages to the plaintiffs if the plaintiffs succeed in the trial if the injunction is not granted. The learned judicial commissioner failed to consider whether the plaintiffs are in the position to compensate the defendants if the plaintiffs fail to succeed in the trial. The learned judicial commissioner had totally ignored the fact that in the present case the plaintiffs never gave an undertaking to pay damages to the defendants in the event the plaintiffs were not successful in their claim at the trial.

[50] In *Mogul Steamship Co v McGregor, Gow & Co and others* [1892] AC 25, the court stated that merely because a plaintiff will suffer some damages, or will for a time have a difficulty in carrying on his trade or may have to carry it at a loss, it cannot be said that the plaintiff suffers irreparable injury to prevent which injunction will issue.

[51] It is settled law that before an injunction is granted the court will require an undertaking as to damages. The reason being that interlocutory injunctions are granted before the trial and therefore before the full merits of the case have been fully determined. Thus, the applicant is required to give an undertaking that he promises to pay the defendant damages if the applicant later fails to establish his right to injunction (see *Hubbard and others v Pitt and others* [1975] 3 WLR 201).

[52] We are aware that a possible exception to the requirement of an undertaking to damages is poverty. However, there is no proof of plaintiffs' poverty for the learned judicial commissioner to exercise his discretion properly except stating that the plaintiffs are Orang Asli therefore, generally have no financial capacity.

[53] In assessing where the balance of convenience lies, the interest of the public should also be taken into account by the High Court (see *Keet Gerald Francis Noel John v Mohd Noor@ Harun bin Abdullah & Ors*). As averred by the defendants in their affidavit in reply that the mini hydroelectric project, if the injunction was not granted, would soon be completed and the benefit will definitely go back to the plaintiffs and other residents living around the said area.

[54] The mini-hydroelectric at Sungai Ulu Geruntum is a renewable energy ('RE') project initiated by the Ministry of Science, Technology and Innovation ('MOSTI') that gives supervisory power to the Sustainable Energy Development Authority Malaysia ('SEDA') to monitor the mini-hydroelectric development in Malaysia, aiming at supplying electricity to the public. In other words, there will be disruption of electricity supply in that area should the injunction is granted and/or the project is offset by the plaintiffs claims. The defendants had contended that the lands where the project was carried out is not on or within the lands claimed by the plaintiffs as customary lands.

[55] In *Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd* [2000] 2 MLJ 133, the respondent owned a piece of land on which the appellant constructed a pylon, forming part of the national electricity grid. The respondent brought an action against the appellant for trespass and also sought for injunction against the appellant. The High Court held that public interest is always a relevant consideration in granting specific relief. As the pylon

formed part of the national electricity grid, if injunction order was maintained, there would be disruption of electricity supply in Peninsular Malaysia and it was not in the public interest that such a disruption should occur. Accordingly, the injunction made by the court below was set aside. The Court of Appeal stated as follows:

> I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public, one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed.

[56] The defendants had submitted that the plaintiffs said that this is a dam project. By right, it is a mini-hydroelectric plant. Obviously, there are distinction between dam and mini-hydroelectric plant. A dam requires a large reservoir as a water storage, whereas in a mini-hydroelectric plant, impoundment of water is not required. This project applies the 'run-off the river' concept where some of the water is diverted from a river and sent into a pipe called a penstock which will later on go downhill to the turbine in the powerhouse. Due to the difference in altitude, potential energy from the water up river is transformed into kinetic energy while it flows downriver through the penstock, giving it the speed required to spin the turbine that in tum transform this kinetic energy into electrical energy. The water leaves the powerhouse and is returned to the river without altering the existing flow or water levels.

[57] Since no impoundment of water is involved in the mini-hydroelectric project, flooding the upper part of the river is not required as it does not need a reservoir. As a result, people living at or near the river don't need to be relocated and natural habitats are preserved. This has a minimal environmental impact on the local ecosystem.

[58] The turbine that will be used in this project is ready to be installed. It has already been delivered by the supplier to the defendants. It is a custom-made turbine in which the machine is designed based on the water flow rate of the river at Sungai Ulu Geruntum. It is usable only for this project and not for other mini-hydro project. Therefore, the defendants would suffer great injustice if the injunction is granted because the turbine is not a saleable asset. Other than the turbine, materials that have already been delivered are the mild steel pipes, butterfly valve, pipe headstock valve and other construction materials.

[59] We agree with the defendants and it is also our view that the grant of such an interlocutory injunction in this case is clearly contrary to public interest.

Damages is an adequate remedy

[60] It was also held in *Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah & Ors* that the judge would be entitled to take into account all discretionary considerations, such as any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial.

[61] It is the defendants' submission that damages will be an adequate remedy to the plaintiffs should the court refused to grant the interlocutory injunction sought by the plaintiffs.

[62] The defendants submitted that despite praying for a declaration against the defendants, the plaintiffs have also prayed for damages in the amended statement of claim. This can be seen in para 61(n) of the amended statement of claim where the plaintiffs' prayed for the defendants to pay damages to the plaintiffs for trespass and damages be assessed by the court. We are aware the damages are for the trespass to lands if the plaintiffs succeed in their claim.

[63] Be that as it may, the prayer indicates that damages are an adequate remedy in the circumstances. Therefore, the basis for exercising the court's equitable jurisdiction does not arise in this action. *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408 is a case where an injunction was not granted by the court on the basis that the damages would be an adequate remedy. Hashim Yeop Sani CJ held as follows:

> But it would seem quite clear that the most important factor to consider as a matter of principle is the question of whether in lieu of the injunction damages would be an adequate and proper remedy because in the matter of injunctions and exercising its jurisdiction the court acts upon the principle of preventing irreparable damage. As Lindley LJ said in *London & Blackwell Rly Co v Cross* [1986] 31 Ch D 354 at p 369:
>
> > The very first principle of injunction law is that you do not obtain injunctions for actionable wrongs for which damages are the proper remedy.
>
> ... Therefore, the injunction was in our view not properly granted. In a case like this, it would be more appropriate to order an early hearing of the application to strike out the counter claim and the application for summary judgment rather than to grant the injunction.

[64] The High Court in *Kawood Sdn Bhdv HSBC Bank Malaysia Berhad & Ors* [2001] MLJU 650, held that in the statement of claim, the plaintiffs are claiming for damages to be assessed together with interest. By its own admission, the plaintiff acknowledged that damages are an adequate remedy and can be assessed and quantified. As such, the court said that there is no basis

to grant the injunction to the plaintiff.

[65] Similarly, in *Kilang Kosfarm Sdn Bhd v Kosma Nusantara Bhd* [2002] 5 MLJ 662, Ramli Ali J (as he then was) held that the plaintiff have prayed in prayers 3 and 4 of the statement of claim for general and exemplary damages and to ascertain the damages suffered by the plaintiff from the time the plaintiff was expelled from the said estate until the time when vacant possession of the said estate is handed over to the plaintiff as prayed in prayer 2 of the statement of claim. On all those provisions, His Lordship satisfied those damages seem to be a suitable and adequate remedy for the plaintiff.

[66] In the circumstances of this case and the application for interlocutory injunction, it is our considered view that the damages are an adequate remedy and therefore the court will refuse the grant of the interlocutory injunction sought by the plaintiffs.

CONCLUSION

[67] In the present case, the plaintiffs have failed to file the application promptly as required by the law and therefore the plaintiffs are not entitled as a matter of law to be granted the interlocutory injunction. Added to that, the interlocutory injunction should not be granted since damages are an adequate remedy.

Appeal allowed and interlocutory injunction set aside.

Reported by Ashok Kumar